

UNITED STATES DISTRICT COURT
FOR SOUTH CAROLINA

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2005 SEP 28 P 12:38

Daniel S. O'Shea)

Plaintiff,)

v.)

NATIONAL LABOR)
RELATIONS BOARD)
Baltimore (Region 5))
103 S. Gay Street – 8th Floor)
Baltimore, MD 21202-4061)

Case No. 2:05-2808-DCN-RSC

SERVE:)
Wayne B. Gold, Regional Director)
NATIONAL LABOR RELATIONS)
BOARD)
Baltimore (Region 5))
103 S. Gay Street – 8th Floor)
Baltimore, MD 21202-4061)

Defendant.)

ALSO SERVE:)
Attorney General of the United States)
5111 Main Justice Building)
10th Street & Constitution Avenue, NW)
Washington, DC 20530)

ALSO SERVE:)
United States Attorney for the District of)
South Carolina)
1441 Main Street)
Suite 500)
Columbia, SC 29201)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, (Attached as O'Shea Exhibit 1.) *as amended*, to compel the production of records concerning the National Labor Relations Board's ("NLRB" or "The Board") failure to act within the time limitations imposed to respond to a FOIA request, attempting to apply charges and fees to the Plaintiff for information that is not charged upon a first request and other violations of FOIA law.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Daniel S. O'Shea was an employee of United Parcel Service, Inc. ("UPS") and International Brotherhood of Teamsters Local Union 639 ("IBT Local Union 639" or "Local 639") member for twenty-four (24) years.
4. Plaintiff Daniel S. O'Shea is the requester of the withheld records.
5. Defendant National Labor Relations Board ("NLRB" or "The Board") is an agency of the United States, and has possession of and control over the records that Plaintiff seeks.

STATEMENT OF FACTS

6. (a) Plaintiff Daniel S O'Shea was a member of the International Brotherhood of Teamsters for twenty-four (24) years who alleges a wrongful discharge on May 13, 2003 by United Parcel Service, Inc. ("UPS") after previously filing a workers compensation injury claim.

(b) The Plaintiff alleges that the basis of the termination was denied, altered and/or applied new company policies that UPS never presented to the Plaintiff in his twenty-four (24) year career.

7. The Plaintiff was a dissident of officers of his IBT Local Union 639 and alleges that the discharge was upheld at the Atlantic Area Parcel Grievance ("AAPGC") due to, among other things, union representation that was arbitrary, discriminatory and in bad faith for refusing to investigate nor procure exculpatory evidence such as the company policies and procedures O'Shea was never before informed of and were critical to his defense.

8. August 19, 2003 the Atlantic Area Parcel Grievance Committee ("AAPGC") upheld the discharge even though UPS provided no company policies or procedures and that Local Union 639 refused to acquire.

9. (a) June 6, 2003 Plaintiff Daniel S. O'Shea filed unfair labor practice charges against UPS with the NLRB.

(b) January 29, 2004 the NLRB's Regional Director Wayne R. Gold denied Plaintiff's charges.

10. (a) February 9, 2004 Plaintiff O'Shea appealed the decision.

(b) April 23, 2004 the NLRB denied Plaintiff's appeal.

11. February 12, 2004 Plaintiff O'Shea filed suit alleging wrongful discharge and breach of the Collective Bargaining Agreement by UPS and against IBT Local Union 639 for breach of its Duty of Fair Representation under Section 301 of the National Labor Relations Act ("The

Act"). Daniel S. O'Shea v. IBT Local Union 639 and United Parcel Service, Inc. Case citation JFM-05-937 in the U.S. District Court for Maryland.

12. (a) April 11, 2005 Plaintiff O'Shea requested "all documents, supporting evidence" from the NLRB investigation with respect to his charges against UPS, case number 5-CA-31288 immediately after attempting to file an online FOIA request. (Attached as O'Shea Exhibit 2.)

(b) April 14, 2005 the NLRB acknowledged Plaintiff O'Shea's FOIA request. (Attached as O'Shea Exhibit 3.)

13. (a) May 5, 2005 by Motion in JFM-05-937, UPS relies on the Board's statement that "the proceedings were fair and regular" in support of their Motion to Dismiss Plaintiff O'Shea's complaint.

(i) In Mark Aaron's (UPS Labor Division Manager) attached Affidavit to that Motion he admits in paragraph 12 that "O'Shea was not terminated for a cardinal offense." However, the CBA is clear in Articles 7 and 50 that a warning notice must be given prior to any discharge. Plaintiff has requested all documents and information in his FOIA request to determine how it is possible the Board reached its conclusion that "the proceedings were fair and regular," while a direct violation of the CBA occurred. (Attached as O'Shea Exhibit 4.)

(ii) Mark Aaron also states in paragraph 15:

"... at every step, UPS's decision to discharge Mr. O'Shea for just cause has been upheld, and the NLRB - the agency created by Congress and vested with the expertise to review labor/management issues, has upheld the fairness and regularity of the arbitration proceeding in this case, as well as the representation Mr. O'Shea received from Local 639."

UPS, Local Union 639 nor the NLRB, now after two (2) years, has yet to disclose the existence of any company policies or procedures that Plaintiff O'Shea has been alleged to have violated.

14. In Response to UPS' Motion, Plaintiff contests that the proceedings were fair and regular and questions whether a full and complete investigation was actually completed by the NLRB as stated in his Affidavit, Paragraph 19:

"I did not withdraw my charge against UPS even though I was informed a full investigation would not be forthcoming for one specific reason . . . It was and is my intention to notify the Senators and Congressmen of the great state of Maryland and this country and request an investigation into the NLRB and why a full investigation could not be completed. The NLRB upheld UPS's discharge of me." (Attached as O'Shea Exhibit 5.)

15. April 11, 2005 the Board did not respond to Plaintiff O'Shea's FOIA request until August 29, 2005 in violation of FOIA's time restrictions in U.S.C. § 552(a)(6)(A)(i):

“Determine within twenty days (exceptions Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor...” [Emphasis added.]

Not only did the Board fail to respond to Plaintiff O’Shea within the mandatory twenty (20) day time period, the Board failed to respond for one-hundred and forty (140) days!

16. In the Board’s FOIA Reference Guide, Section IX. Judicial Review it states:

“Judicial review ordinarily requires that you have filed an administrative appeal and have received a response. However, if the NLRB fails to respond to either your initial request or your appeal within the time limits specified in the FOIA, you may file suit as soon as those time limits have expired.” [Emphasis added.] (Attached as O’Shea Exhibit 6.)

By the Board’s refusal to respond within FOIA’s time limits Plaintiff can and does seek judicial review.

17. (A) The Board’s letter of August 29, 2005 denies Plaintiff the first copy of all records requested without charge. However, the first copy of any FOIA request is ordinarily provided free of charge pursuant to the Board’s Rules and Regulations, 29 C.F.R. Sec. 102.117(h) it states:

(h) An individual granted access to records pertaining to such individual contained in a system of records may review all such records. For that purpose the individual may be accompanied by a person of the individual’s choosing, or the record may be released to the individual’s representative who has written consent of the individual, as described in paragraph (j) of this section. A first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records shall be assessed at the rate of 10 cents for each sheet of duplication. [Emphasis added.] (Attached as O’Shea Exhibit 7.)

(i) In the Board’s denial, Regional Director Wayne R. Gold apparently intentionally in the August 29, 2005 letter misquotes the Board’s Rules and Regulations at the same paragraph by fabricating additional language that does not exist, “the first copy of records supplied to the Board by an individual will be provided without charge to that individual.” [Emphasis added.] Simply put, there exists no such language in the existing paragraph of the Rules and Regulations. (Attached as O’Shea Exhibit 8.)

(ii) Also in the Board’s denial, Regional Director Wayne R. Gold acknowledges in the August 29, 2005 letter there are “. . . remaining investigative documents you requested . . .” in direct violation of Sec. 102.117(h) which states, “a first copy of any such record or information will ordinarily be provided.” The Plaintiff received from the Board only those documents that

he submitted to the Board and as Wayne R. Gold acknowledges, there are remaining investigative documents that still exist that were denied.

(iii) Further in the Board's denial, Regional Director Wayne R. Gold violates 5 U.S.C § 552(a)(6)(A)(i), in part:

““Determine within twenty days (exceptions Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination;” [Emphasis added.]

The Regional Director in his August 29, 2005 letter again commits an unlawful act by refusing to disclose to Plaintiff his right to appeal any adverse determination (including fees) and who and where to appeal to.

The Plaintiff attempted to appeal with the Department of Justice by letter dated September 1, 2005. The Department of Justice notified the Plaintiff that they had “no jurisdiction over records maintained by other federal agencies.”

Plaintiff at that point determined to file no appeal to the NLRB and due to the Board's myriad violations of law, exercised his right under FOIA to seek judicial review.

The nature of the Board's conduct is similar to that of the denial of UPS and Local Union 639 to ever disclose company policies and procedures that the Plaintiff was alleged to have violated and which have never been seen in any venue.

18. Plaintiff has a statutory right to the records that it seeks to show what UPS company policies and procedures do exist and why they were denied to Plaintiff O'Shea and the membership prior to his termination, at his local hearing, at the AAPGC, by Local Union 639 and now at the doorstep of two Federal Courts. Or, in the alternative, if such UPS company policies and procedures do not exist in the NLRB file, it would further support O'Shea's position that no such company policies and procedures ever existed and that a full and fair hearing by the NLRB did not occur as UPS alleges they did in their claim to the Court in the United States District Court for the District of Maryland (Northern Division).

There is no legal basis for the Defendant NLRB's refusal to disclose them.

WHEREFORE, Plaintiff requests that this Court:

- (1) Declare that Defendant's refusal to disclose the records requested by Plaintiff is unlawful;
- (2) Order Defendant to make the requested records available to Plaintiff;

(3) Award Plaintiff its costs and reasonable attorneys' fees in this action as provided by 5 U.S.C. § 552(a)(4)(E);

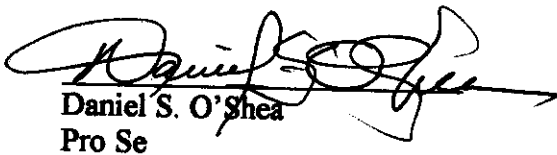
(4) Issues a written finding as established under U.S.C. § 552(a)(4)(F) that the circumstances surrounding the withholding raises questions as to Regional Director Wayne B. Gold acting in an arbitrary or capricious manner with respect to the withholding, and initiate proceedings by the Special Council subject to 552(a)(4)(F), including but not limited to as stated above, actions that were arbitrary and capricious in violation of FOIA by:

- 1 - refusing to respond in a timely manner (140 days later),
- 2 - fabricating additional language of 29 C.F.R. Sec. 102.117(h),
- 3 - submitting back to the Plaintiff documents he submitted to the Board, not all documents,
- 4 - refusing to notify Plaintiff of his right to appeal, to whom and where to appeal to,

and;

(5) Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,


Daniel S. O'Shea
Pro Se

12 26th Avenue
Isle Of Palms, SC 29451
(843) 696-6961

Dated: September 28, 2005